

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN DOO SUH,

Defendant and Appellant.

B266163

(Los Angeles County
Super. Ct. No. BA416562)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jose I. Sandoval, Judge. Affirmed.

H. Russell Halpern for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant John Doo Suh appeals from his conviction of battery with serious bodily injury and assault by means likely to cause great bodily injury. He argues (1) he was denied due process based on the prosecution's delay in arresting him, and (2) the prosecutor committed misconduct at trial. We find no error and thus we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On May 4, 2013, at the CF Karaoke Bar, Suh punched Hoyle Kang twice in the eye. On September 24, 2013, criminal charges were filed against Suh. He was arrested on January 7, 2014, at an international airport upon his return from a trip.

An information was later filed charging Suh with battery with serious bodily injury (Pen. Code, § 243, subd. (d))¹, and assault by means likely to produce great bodily injury (§ 245, subd. (a)(4)). It was also alleged that Suh inflicted great bodily injury on Kang. Suh pled not guilty.

In January 2015, Suh moved to dismiss the complaint, arguing he had been prejudiced by the delay between the incident and his arrest. He submitted a declaration stating that witnesses and video footage of the events had been lost due to the passage of time. The People opposed the motion, arguing the police had diligently investigated the case. The motion was denied. The court explained, "We're not talking about the lapse of a significant period of time. . . . [¶] . . . [¶] I simply cannot, based on the chronology articulated by the prosecution, find fault with the manner in which this case has been investigated."

¹ All statutory references are to the Penal Code unless otherwise stated.

At trial, Kang testified that he was 55 years old at the time of the incident. The record indicates that Suh was about 35 years old at the time. On the evening of May 4, 2013, Kang attended a dinner party and drank two 22-ounce bottles of beer between 6:00 p.m. and 9:00 p.m. He met John Yeo at the party and, at 11:00 p.m., they went to the CF Karaoke Bar.

When they arrived at the bar, Kang noticed three people, including Suh, fighting inside the bar. Kang entered the bar and Suh said to him, "What's your problem?" Kang replied, "I'm a customer, I'm just passing by" and walked past Suh. Suh followed Kang and "blocked" him. Suh then asked him again, "What's your problem?," to which Kang replied, "there [i]s no problem." At that point, Suh punched Kang twice in the eye. Kang fell to the floor and lost consciousness.

Yeo testified that, at around 11:30 p.m. on May 4, 2013, he and Kang went in to the CF Karaoke Bar together. "A group of people" were standing in the entrance arguing, including Suh, who was shirtless and "really angry, screaming." Suh asked Kang, "what's your problem" and then punched Kang in the face. Kang fell and Suh left the bar. An ambulance transported Kang to the hospital, and the police responded to the scene. After the police left, Suh returned to the bar and spoke with Yeo. Yeo asked Suh, "why do you hit the old people[?]" Suh apologized and offered to "take care of all the medical bills."

Paul Kim testified that he was a friend of Suh, and had been "out drinking" with Suh on the night of the incident. They were leaving CF Karaoke Bar when Kang and Yeo were arriving. As the men passed each other, Kim heard Kang and Yeo say something in Korean which he translated as "motherfucker." Suh then asked Kang, "what's your problem?" to which Kang

replied, “I don’t have a problem, what’s your problem.” Suh said “forget it” and “while he was turning back, [Kang] kind of got aggressive and [went] towards [Suh] to throw a punch.” Suh then hit Kang twice, and Kang “fell forward and grabbed his face.” Suh and Kim left the bar, but later returned and spoke with Yeo. Yeo asked Kim, “why would you hit an old man?” and Suh apologized.

Sergeant Maurice Brunel testified he responded to the scene and spoke with the bar manager. The manager said the surveillance cameras were not working at that time.

Detective Hee Bae Cho testified that three days after the incident he went to the bar to investigate. The bar was closed when he arrived, but there was a security guard working there. Cho left his business card with a guard and asked him to have the manager call him. The manager never contacted Cho.

Dr. Ryan O’Connor testified that he treated Kang for his injuries on the night of the incident. Kang arrived by ambulance around 12:40 a.m. and presented with “swelling and bruising to . . . the area around his left eye.” Kang told Dr. O’Connor he had consumed two beers. Kang’s “alcohol level” was twice “the legal limit for driving” but Kang did not seem intoxicated. According to Dr. O’Connor, Kang was “completely calm and cooperative the entire time he was in the emergency room.” A toxicologist testified that, based on Kang’s blood-alcohol level at the hospital after the incident, Kang must have consumed approximately five or six 22-ounce beers that evening.

A jury found Suh guilty of all charges. Imposition of his sentence was suspended and he was placed on three years formal probation, which included 50 hours of community service and an anger management course. He timely appealed.

CONTENTIONS

Suh contends (1) he was denied due process because of the lengthy delay between the incident and his arrest, and (2) the prosecutor committed misconduct at trial by presenting Kang's false testimony regarding the amount of alcohol he drank prior to the incident, misstating the law on self-defense, and misrepresenting the elements of assault likely to cause great bodily injury.

DISCUSSION

1. Prearrest Delay

Suh contends the eight-month delay between the incident in May 2013 and his arrest in January 2014 denied him due process of law under the state and federal Constitutions. In essence, he argues the trial court erred in denying his motion to dismiss. We do not find any constitutional violation.

"The due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and article I, section 15 of the California Constitution protect a defendant from the prejudicial effects of lengthy, unjustified delay between the commission of a crime and the defendant's arrest and charging. [Citations.] . . . [¶] . . . "[T]he right of due process protects a criminal defendant's interest in fair adjudication by preventing unjustified delays that weaken the defense through the dimming of memories, the death or disappearance of witnesses, and the loss or destruction of material physical evidence." [Citation.] Accordingly, "[d]elay in prosecution that occurs before the accused is arrested or the complaint is filed may constitute a denial of the right to a fair trial and to due process of law under the state and federal Constitutions. A defendant seeking to dismiss a charge on this ground must demonstrate prejudice

arising from the delay. The prosecution may offer justification for the delay, and the court considering a motion to dismiss balances the harm to the defendant against the justification for the delay.” [Citation.]’ [Citation.]

“Prejudice may be shown by ‘loss of material witnesses due to lapse of time [citation] or loss of evidence because of fading memory attributable to the delay.’” [Citation.] . . . [¶] . . . The justification for the delay is strong when there is ‘investigative delay, nothing else.’ [Citation.] [¶] We review for abuse of discretion a trial court’s ruling on a motion to dismiss for prejudicial prearrest delay [citation], and defer to any underlying factual findings if substantial evidence supports them [citation].” (*People v. Cowan* (2010) 50 Cal.4th 401, 430–431.)

Here, Suh argues he was prejudiced by the delay on three grounds: (1) “[a] percipient witness [was] lost to the defense, along with a video of the event”; (2) “[d]uring the trial all the witnesses complained of loss of memory from the delay in time”; and (3) Detective Cho “indicated that [CF] Karaoke [B]ar was closed when he went to the location and was unable to locate or interview any of the staff.”

These claims are conclusory and, thus, fail to show prejudice. (See *Serna v. Superior Court* (1985) 40 Cal.3d 239, 250 [“ ‘The showing of actual prejudice which the law requires must be supported by particular facts and not . . . by bare conclusory statements.’ [Citation.]”].) In addition, Suh does not accompany his claims with any citations to the record and, therefore, has not met his burden of establishing error. (See *Green v. City of Los Angeles* (1974) 40 Cal.App.3d 819, 835 [“An appellate court is not required to search the record to determine whether or not the record supports appellants’ claim of error. It is the duty of

counsel to refer the reviewing court to the portions of the record which support appellants' position."].)

With respect to Suh's first argument, he does not identify who the "percipient witness" was who was "lost" or why that witness's testimony was of crucial significance to the defense. He also does not cite to any evidence that video footage existed. We note that, at trial, Sergeant Brunel testified the bar manager stated the surveillance cameras were not operational at the time of the incident.

Suh next argues that, at the time of trial, the memories of witnesses had faded due to the delay in time. Again, Suh does not cite to any portion of the record where a witness was unable to recall the events because of the passage of time. In fact, as shown by the factual summary above, all of the key witnesses at trial testified in detail as to their memories of the events. Furthermore, Sergeant Brunel and Detective Cho were able to refresh their memories with police reports. (See *Scherling v. Superior Court* (1978) 22 Cal.3d 493, 506 [prejudice from fading witness memories due to delay is diminished where contemporaneous police reports exist that may be used to refresh the witnesses' recollection].)

Lastly, Suh complains about Detective Cho's inability to "locate and interview any of the staff" at CF Karaoke Bar because the bar "[had] closed when [Cho] went to the location." Again, Suh does not cite to evidence in the record that the bar had shut down by the time Cho attempted to investigate the crime. Cho's testimony at trial, by contrast, indicated that he first went to the bar three days after the assault, a security guard was working there, and Cho asked the guard to have the manager call him.

Accordingly, Suh has not shown prejudice due to any prearrest delay. (See *People v. Serna*, *supra*, 40 Cal.3d at p. 249 [“the initial burden in establishing a violation of article I, section 15, is on the defendant seeking dismissal who must demonstrate prejudice attributable to the delay in arrest. [Citation.] Only after he has done so must the court determine if the delay was justified and engage in the balancing process. [Citation.]”].) On these grounds, we conclude the trial court did not abuse its discretion in denying the motion to dismiss.

2. *Prosecutorial Misconduct*

Suh argues the prosecutor committed misconduct at trial by (1) presenting Kang’s false testimony about the amount of alcohol he drank prior to the incident, (2) misstating the law on self-defense, and (3) misrepresenting the elements of assault likely to cause great bodily injury. We address and reject each of these contentions in turn.

a. *Perjured Testimony*

“‘Under well-established principles of due process, the prosecution cannot present evidence it knows is false and must correct any falsity of which it is aware in the evidence it presents, even if the false evidence was not intentionally submitted.’ [Citation.]” (*People v. Avila* (2009) 46 Cal.4th 680, 711.) The seminal case establishing this sub-category of prosecutorial misconduct is *Napue v. Illinois* (1959) 360 U.S. 264 [79 S.Ct. 1173], which gave rise to the following rule: “To establish prosecutorial misconduct for the use of false testimony, a defendant must show the prosecutor knowingly used perjured testimony, or failed to correct what he subsequently learned was false testimony, and that the falsehood was material. [Citations.] Perjury is defined as testimony ‘given with the willful intent to

provide false testimony and not as a result of a mistake, confusion, or faulty memory.’ [Citation.]” (*United States v. McNair* (11th Cir. 2010) 605 F.3d 1152, 1208, fn. omitted.) “[A] *Napue* violation—a presentation to a fact-finder of false testimony knowing it to be false—results in the reversal of a conviction if ‘the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury’ [Citation.]” (*Dow v. Virga* (9th Cir. 2013) 729 F.3d 1041, 1047–1048, fn. omitted.)

Kang testified he drank two 22-ounce beers during the evening prior to the assault. Suh argues the prosecution knew Kang’s testimony was false because the toxicology results showed that Kang had consumed more than two 22-ounce beers that evening. Suh has not shown that Kang’s testimony was in fact perjured, but only points to an inconsistency between Kang’s account of the alcohol he consumed and the medical evidence of the amount of alcohol he consumed. Such an inconsistency does not establish that the testimony was actually false as opposed to the result of “mistake, confusion, or faulty memory.” (See *People v. Avila, supra*, 46 Cal.4th at p. 712 [“Any inconsistency between [the witness’s] pretrial statements and trial testimony does not ineluctably demonstrate his trial testimony was false, or that the prosecutor knew it was false.”].)

Furthermore, Suh has not shown that the presentation of this alleged false testimony was material or affected the judgment. He argues simply that the prosecution’s case “hinged upon the credibility of” Kang. However, the defense had an opportunity to, and did, impeach Kang’s testimony with testimony by the toxicologist. Accordingly, the jury was fully informed as to the evidence of Kang’s intoxication during the

assault, and “could decide for itself which of the conflicting versions of the incidents in question was true.” (*People v. Gordon* (1973) 10 Cal.3d 460, 474.)

As Suh has not shown Kang’s testimony was false or that the alleged false testimony affected the judgment, we conclude the prosecutor’s presentation of Kang’s testimony did not constitute prosecutorial misconduct.

b. *The Law on Self-Defense*

Suh contends the prosecution misrepresented the law on self-defense in closing argument when the prosecution said the law required Suh to walk away from his confrontation with Kang. In support of this argument, Suh cites to the prosecutor’s statement that “maybe [Suh] could have just walked away” after his confrontation with Kang, instead of punching him. We conclude the prosecutor did not misstate the law.

“Advocates are given significant leeway in discussing the legal and factual merits of a case during argument. [Citation.] However, ‘it is improper for the prosecutor to misstate the law generally [citation]’ To establish such error, bad faith on the prosecutor’s part is not required. [Citation.] ‘. . . A more apt description of the transgression is prosecutorial error.’ [Citation.]” (*People v. Centeno* (2014) 60 Cal.4th 659, 666–667.)

A “party about to be injured” may lawfully resist “the commission of a public offense.” (§ 692.) “Resistance sufficient to prevent the offense may be made by the party about to be injured” to “prevent an offense against his person.” (§ 693.) “A person who without fault on his part is exposed to a sudden felonious attack need not retreat.” (*People v. Collins* (1961) 189 Cal.App.2d 575, 588.)

Consistent with this legal standard, the trial court gave CALCRIM 3470, instructing the jury on when a defendant may lawfully use force in self-defense. CALCRIM 3470 provides in part that “The defendant acted in lawful self-defense if: [¶] 1. The defendant reasonably believed that he was in imminent danger of suffering bodily injury or was in imminent danger of being touched unlawfully; [¶] 2. The defendant reasonably believed that the immediate use of force was necessary to defend against that danger; and [¶] 3. The defendant used no more force than was reasonably necessary to defend against that danger. . . . [¶] A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend himself or herself”

The prosecution, in closing argument, addressed CALCRIM 3470 stating, “You have to . . . decide is self-defense reasonable. . . . [W]as the defendant acting reasonably when he hit . . . Kang that night[?] [I]f you find that the way that the defendant acted that night was unreasonable then it’s not self-defense. . . . [¶] . . . [¶] Kim told you that the defendant punched [Kang] twice. Is that what a reasonable person would do in that situation, if you felt somebody was going to hit you, somebody that looks like . . . Kang[?] [¶] If you feel that what he did was not reasonable maybe he used too much force. Maybe he could have just walked away. . . . If you find . . . the way he acted was unreasonable, then it’s not self-defense.”

The prosecution’s argument instructed the jury to consider whether Suh’s use of force against Kang was based on a reasonable belief that such force was necessary to defend himself against Kang. Specifically, the prosecution urged the jury to consider whether, instead of using force, it would have been reasonable for Suh to walk away from Kang. The prosecution did

not state, as Suh claims, that Suh was *required to* walk away. Rather, the prosecution simply explained that the jury should consider all of the possible actions Suh could have taken in determining whether his use of force was reasonable. This did not conflict with CALCRIM 3470 and was not a misstatement of the law.

c. Assault with Force Likely to Produce Great Bodily Injury

Suh contends the prosecutor misrepresented the elements of assault likely to cause great bodily injury (§ 245) in closing argument when the prosecutor failed to “explain that . . . the prosecution must prove that the force used was likely to cause great bodily injury.” In particular, Suh argues that the prosecutor’s example that “spit[ting] on somebody” was “enough” to show force was misleading because the prosecutor did not “state that may be true for count one[—section] 243[—]but is not true as to count two[—section 245.]” We conclude any error was harmless.²

“When attacking the prosecutor’s remarks to the jury, the defendant must show that, ‘[i]n the context of the whole argument and the instructions’ [citation], there was ‘a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we “do not lightly infer” that the jury drew the most damaging rather than the least damaging

² In addition, Suh’s complaint is waived because trial counsel did not object to this alleged misstatement of law. (See *People v. Williams* (1997) 16 Cal.4th 635, 673.)

meaning from the prosecutor's statements. [Citation.]" [Citation.]" (*People v. Centeno*, *supra*, 60 Cal.4th at p. 667.)

"The crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions.' [Citations.]" (*People v. Callahan* (1999) 74 Cal.App.4th 356, 372.) "The court's instructions are determinative in their statement of law, and we presume the jury treated the court's instructions as statements of law, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade. [Citation.]" (*People v. Sanchez* (1995) 12 Cal.4th 1, 70, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Here, the judge correctly instructed the jury on the elements of section 245 (CALCRIM 875)—including that "[t]he force used was likely to produce great bodily injury"—and that the prosecution was required to prove these elements. We must assume the jury followed those instructions and, therefore, correctly understood the prosecution's burden to prove force likely to produce great bodily injury. Accordingly, we conclude it is not reasonably probable the jury was misled by the prosecutor's failure to specifically state that while spitting on somebody may constitute force, force likely to produce great bodily injury has a different definition. (See *People v. Medina* (1995) 11 Cal.4th 694, 760 [prosecutor's misstatement of law was harmless where the court correctly instructed the jury on the law].)

DISPOSITION

The judgment is affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL
REPORTS**

EDMON, P. J.

We concur:

ALDRICH, J.

STRATTON, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.